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IN THE

Supreme Court of the United States

NO. 352

OCTOBER TERM, 1952.

JAMES MARPES, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MEMORANDUM IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MEMORANDUM IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James Marpes, petitioner, respectfully prays that a writ of *certiorari* issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit, entered August 25, 1952, denying a re-hearing in the matters of United States of America against James Marpes, thereby refusing to consider *a substantial and important question of Federal Law which has not been, but should be, settled by your Court,* namely, the construction of and the applicability of Title 18 U. S. C. A.

(Crimes and Criminal Procedure)—Section 659 (Interstate or Foreign Baggage, Express or Freight; State Prosecutions), Pages 715 and 716, at Page 716, the last paragraph of which reads as follows:

> "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."

to a case (such as the instant cases), where the defendant is indicted under the laws of the State where the criminal offenses were committed, *and was for the same offenses indicted* also under the laws of the United States; but where the judgment of conviction in the State Court became a finality prior to the final adjudication for the same offenses in the United States Courts.

JURISDICTION.

The Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1). The judgments sought to be reviewed were entered in the United States District Court for the Western District of Pennsylvania on January 10, 1952, and affirmed by the United States Circuit Court of Appeals for the Third Circuit on July 7, 1952.

A Petition for Re-hearing was presented to the said Circuit Court of Appeals and on August 25, 1952, a rehearing was refused. No opinion was rendered.

It was in this Petition for Re-hearing that the question now presented to your Court, was first raised.

SUMMARY STATEMENT.

The petitioner, James Marpes, was one of four defendants who were indicted on *January 16, 1951,* charged with "hi-jacking" goods in interstate shipment from New York, N. Y., to Pittsburgh, Pennsylvania, in violation of 18 U. S. C. A., Section 659.

Two of the defendants in one case entered pleas of Guilty and two, one of them, the petitioner, elected to go to trial.

However, on *November 6, 1950,* the petitioner and his co-defendants were indicted in the State Criminal Courts of Allegheny County, Pennsylvania, on the subject matter as set forth in the Federal indictments.

On *May 16, 1951,* the petitioner went to trial in the District Court of the United States for the Western District of Pennsylvania, and on *May 22, 1951,* the jury returned a verdict of guilty against the petitioner (however, this not being a judgment of conviction) and application for judgment of acquittal or, in the alternative, motion for a new trial was duly filed by the petitioner.

However, on *June 18, 1951,* while petitioner's above stated motions were pending, and *long* prior to the disposition of same, the petitioner *entered a plea of guilty,* on the merits, in the Criminal Courts of Allegheny County, Pennsylvania, to the same offenses for which he was tried and found guilty in the United States District Court, and on *June 29, 1951,* still prior to the disposition of the petitioner's motions and prior to their refusal by the United States District Court, and yet prior to entry of judgment on the verdict in the United States District Court, the petitioner was sentenced in the Crim-

inal Court of Allegheny County, Pennsylvania, by Judge J. Frank Graff, (Specially Presiding).

On *January 10, 1952,* petitioner's motions in the United States District Court were refused and the petitioner was ordered to appear on *January 22, 1952,* in said United States District Court, for the purpose of entry of the judgment of conviction and sentence. On said date, *January 22, 1952,* said order was carried out.

Therefore, long after the finality of the judgment of conviction on the merits and the sentence imposed by the State Court, the United States District Court sought and did enter a judgment of conviction and proceeded to impose sentence.

It is submitted, therefore, that the District Court of the United States had no jurisdiction to enter any judgment of conviction or to impose any sentence, and being without jurisdiction, these proceedings were illegal and the sentence void.

QUESTIONS PRESENTED.

Did the United States District Court for the Western District of Pennsylvania have jurisdiction on either *January 10, 1952,* or *January 22, 1952,* to order entry of judgment of conviction and impose sentence respectively when the petitioner already had been convicted and sentenced on the merits, in the State Courts, for the same act or acts charged in the United States Courts?

Is not the entry of judgment of conviction and imposition of sentence in the United States District Court and affirmed by the Circuit Court of Appeals, in conflict with 18 U. S. C., Section 659?

Did not the Circuit Court of Appeals err in refusing to consider this *substantial, important* and *jurisdictional* Federal Law, which was raised for the first time in the Petition for Re-hearing?

REASONS FOR ALLOWANCE OF THE WRIT.

There is no precedent or decision in the Federal or State system which construes the Federal Law involved, which is substantial and important in nature, and which affects the proposition of jurisdiction, in its application.

The Circuit Court erred in refusing to consider the statute involved, and erred in dismissing the petition for rehearing, which raised the question, without rendering an opinion.

CONCLUSION.

It is respectfully submitted that the reasons herein advanced meet the *Certiorari* standards of this Court and that the Petition should be granted.

JOSEPH A. ROSSI,
Counsel for Petitioner.

MEMORANDUM IN SUPPORT OF PETITION.

There is no precedent or decision that can be found in either Federal or State jurisdiction.

The important exhibits that should be carefully perused by the Court are:—

(a) The indictments in the Federal District Court.

(b) The information and indictment in the State Court, with the entries noted thereon, particularly the dates on both sides thereon.

(c) The appendix appearing in the Consolidated Brief for Appellant and Appendix filed by the Petitioner in the United States Court of Appeals for the Third District.

(d) The last paragraph of the Statute involved (18 U. S. C. A. Section 659).

Neither the opinion of the Judge of the United States District Court, nor the opinion filed by the Circuit Court when the original appeal was taken, are made a part of this Petition, because they would be of no aid, for the reason that question presented to your Court was first raised in the Petition for Rehearing, which was refused, and no opinion rendered.

Respectfully submitted,

JOSEPH A. ROSSI,
Counsel for Petitioner.

STATUTE INVOLVED.

Title 18, U. S. C. A. Section 659. Interstate or Foreign Baggage, Express or Freight; State Prosecutions.

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, bag-

gage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000. or imprisoned not more than ten years, or both; but if the amount of value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be *prima facie* evidence of the place from which and to which such shipment was made.

A JUDGMENT OF CONVICTION OR ACQUITTAL ON THE MERITS UNDER THE LAWS OF ANY STATE SHALL BE A BAR TO ANY PROSECUTION UNDER THIS SECTION FOR THE SAME ACT OR ACTS. June 25, 1948, c. 645, 62 Stat. 729, amended May 24, 1949, c. 139, Section 13, 63 Stat. 91.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 352

JAMES MARPES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 21-25) is reported at 198 F. 2d 186.

JURISDICTION

The judgments of the Court of Appeals were entered on July 7, 1952 (R. 25-26), and a petition for rehearing (R. 32-44) was denied on August 25, 1952 (R. 45). The petition for a writ of certiorari

was filed on September 24, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

A state court judgment suspended imposition of sentence on petitioner's plea of guilty to burglary and receipt of property stolen from an interstate truck shipment for the reason that a federal jury had already found petitioner guilty of substantially the same offenses. The question presented is whether there was a state court conviction under 18 U.S.C. 659 to bar the federal court from imposing sentence.

STATUTE INVOLVED

18 U.S.C. [1946 ed.], Supp. V, § 659:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

* * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *

* * *

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

STATEMENT

On January 16, 1951, two separate indictments under 18 U.S.C. 659 were returned against petitioner and others in the United States District Court for the Western District of Pennsylvania, charging them with having, on October 6, 1950, knowingly received certain merchandise stolen from an interstate truck shipment, and with stealing from the same shipment articles of wearing apparel of the value of more than $38,000 (R. 16-17). Petitioner had, on November 6, 1950, been indicted for substantially the same acts in a Pennsylvania state court of Allegheny County under an indictment charging burglary of merchandise from a motor truck and receiving merchandise with knowledge that it was stolen (p. 1 of photostatic copies contained in supplemental record).

On May 22, 1951, a jury found petitioner guilty on both counts of the federal indictments (R. 3, 10). On May 25 petitioner renewed in each case a motion for judgment of acquittal, or in the alternative for a new trial (R. 3, 11).

Before final judgments and sentences were imposed in the federal court, the following entry was made in the state court case: "June 18, 1951 [petitioner] James Marpes * * * pleaded guilty. And now June 29, 1951 sentence suspended. County pay costs by reason of defendant being guilty in United States Federal Court, as to [petitioner] James Marpes. By the Court. G."[1] (Reverse side of p. 1 of photostatic copies contained in supplemental record.)

On January 10, 1952, the federal court overruled petitioner's motions for acquittal, or in the alter-

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[1] There is nothing in the record to indicate that petitioner was released on probation or parole under the Pennsylvania state court charges. See pp. 4, 5 transcript of proceedings in federal court on imposition of petitioner's sentence on January 22, 1952:

"Mr. Morcroft (attorney for petitioner):

• • •

"To the best of my knowledge, there is no other case pending in any county in Pennsylvania or in any other part of the United States against this defendant. All of them have been disposed of. Paroles have been granted in all of them, sir.

[F.B.I.] Agent Portella: I can correct that.

• • •

"Agent Portella: I've reviewed records on the 18th of January this year of the Allegheny County Court clerk, showing that the charge against [petitioner] James Marpes arising out of this same offense, Helm Truck, in the County Court—this is the disposition: 'As of June 29, 1951, sentence suspended, pending disposition in Federal Court.' So it hasn't finally been disposed of. • • • "

native for a new trial (R. 5, 11, 14). On January 22, petitioner was given consecutive sentences of three years in the penitentiary on one indictment (R. 12), and one year in jail on the other, the execution of the latter sentence being suspended and petitioner being placed on probation for a period of three years (R. 6).

On appeal (R. 6, 12) the judgments were affirmed (R. 25-26; 198 F. 2d 186).

ARGUMENT

Petitioner's sole contention, raised for the first time in the petition for rehearing in the court below (R. 33-35) is that the suspension of sentence by the state court before imposition of the federal sentence, although after return of the verdict in the federal court, was a final judgment precluding federal sentence for the same "act or acts" under the last paragraph of 18 U.S.C. 659, *supra*. Petitioner seeks wholly to escape punishment for crimes of which he was found guilty in the federal court and to which he pleaded guilty in the state court.

There is no necessity to reach such an absurd result. The state court judgment was not a final judgment. Execution of sentence was not suspended nor was petitioner placed on probation; in effect the cause was suspended "by reason of [petitioner] being guilty in United States Federal

Court." [2] A judgment indefinitely suspending imposition of sentence is not final under federal law (*Miller* v. *Aderhold*, 288 U. S. 206, 210-211),[3] or under Pennsylvania law. E.g. *Commonwealth* v. *Sarricks*, 161 Pa. Super. 577, 582; *Commonwealth* v. *Smith*, 130 Pa. Super. 536, 541-543; *Commonwealth* v. *Carelli*, 90 Pa. Super. 416, 418; *Commonwealth* v. *Mellon*, 81 Pa. Super. 20, 22.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER 1952.

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[2] It is significant that petitioner's counsel omits any reference to the above quoted part of the state court judgment, in both his statement and argument.

[3] In *Berman* v. *United States*, 302 U. S. 211, judgment imposing sentence, but suspending its execution and placing accused on probation was held final and in *Korematsu* v. *United States*, 319 U. S. 432, a court order placing accused on probation without imposing sentence was held final. Neither of these two situations is involved in the instant case. See fn. 1, *supra*, p. 4.

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